88-1049

Supreme Court, U.S.
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No. —

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1988

GRANGE INSURANCE ASSOCIATION
Petitioner,

vs.

STATE OF WASHINGTON; Bob J. Mickelson and Jane Doe Mickelson; Peter Bidlake and Jane Doe Bidlake; John Doherty and Jane Doe Doherty; Milton Skov and Jane Doe Skov; Gary Stromier and Jane Doe Stromier; **STATE OF IDAHO**; Clyde Hughes and Jane Doe Hughes; and John Does I through X,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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QUESTIONS PRESENTED

Where agents of defendant Idaho are negligent in testing and certifying that dairy cows, sold for export into Washington State to a Washington purchaser, are free of the disease brucellosis:

1. Is knowledge by defendant Idaho that the dairy cows tested and certified are being exported to Harold Holloway of Toledo, Washington sufficient "minimum contacts" to give it "fair-warning" that its conduct and connection with Harold Holloway and Washington are such that it should reasonably anticipate being subject to Washington jurisdiction under RCW 4.28.185(1)(b), the Tort Long Arm Statute of the State of Washington?

2. Are there sufficient contacts with the State of Washington such that assertion of personal jurisdiction by the court of Washington comports with

"traditional notions of fair play and substantial justice"?

Subsidiary included questions:

A. Whether the first two prongs of the due process test are satisfied if jurisdiction under the Washington Tort Long Arm Statute, RCW 4.28.185(1)(b) is not disputed?

B. Whether the Washington State Supreme Court erred in holding that the "purpose" or intent of defendant's "minimum contacts" must be analyzed under the first prong of the due process test?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Washington State Supreme Court were petitioner Grange Insurance Association, defendant/respondent State of Idaho, and defendant State of Washington.

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Petitioner prays that a writ of certiorari issue to review the en banc decision of the Washington State Supreme court entered in this case on June 16, 1988. The Order Denying Grange's Motion for Reconsideration was entered by the Washington State Supreme Court on September 7, 1988.

OPINIONS BELOW

The Whatcom County, Washington Superior Court entered an Order Granting Defendant Idaho's Motion to Dismiss for Lack of Personal Jurisdiction on December 6, 1985. See Appendix "D".

The Washington State Court of Appeals, Division I reversed the decision of Whatcom County, Washington Superior Court on October 26, 1987, holding that RCW 4.28.185(1)(b) affords petitioner long arm jurisdiction and "assumption of personal jurisdiction over the State of Idaho in this action would not offend

'traditional notions of fair play and substantial justice' within the contemplation of the due process clause." See Grange Insurance v. State, 49 Wash.App. 551, 563, 744 P.2d 366, 373 (1987), and Appendix "C".

The Washington State Supreme Court reversed the Court of Appeals on June 16, 1988, holding the due process clause of the United States Constitution precludes personal jurisdiction over defendant Idaho. See Grange Insurance v. State, 110 Wash.2d 752, 757 P.2d 933 (1988), and Appendix "B". On September 7, 1988, the Washington State Supreme court entered an Order Denying Plaintiff Grange's Motion for Reconsideration. See Appendix "A".

JURISDICTION

By final order dated September 7, 1988, and entered that same date, the Washington State Supreme Court denied petitioner Grange's Motion for

Reconsideration. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Revised Code of Washington section 4.28.185 states, in part:

> (1) Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits said person. . . to the jurisdiction of the courts of this state as to any cause of action arising out of the doing of any of said acts;
> . . . .
> (b) The commission of a tortious act within this state.

The provision of the United States Constitution involved is the Due Process Clause of the Fourteenth Amendment, specifically:

> Section 1. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

STATEMENT OF THE CASE

1. The Facts.

In 1976 and 1977 the dairy industry in Washington went through a dynamic change. Washington dairy farmers were expanding their milk strings. A large demand was placed upon cattle dealers for new dairy animals.

Cattle dealers looked outside the state of Washington for these animals. One source was Idaho. At this time Idaho was experiencing an epidemic of brucellosis, a disease in dairy cattle which is highly contagious.

Until 1977 Washington dairy cattle were free of the disease brucellosis. Holloway, a Washington dairy farmer, also operated an auction business and cattle dealership. In 1976 and 1977 Holloway purchased large numbers of dairy cows from Clyde Hughes of Buhl, Idaho.

There is no dispute the brucellosis

epidemic experienced in Whatcom County, Washington in 1977 and 1978 originated in Idaho.

One or more of the following animals, among others, were infected when sold in Idaho to Holloway and subsequently infected Holloway's cows which led to the infection in at least seven Whatcom County herds: 82 ADV 7266, 82 AEO 4475, and 82 AEH 1509.

When Holloway purchased the cows in Idaho, an agent of Idaho certified on each occasion as follows: "I have inspected the animals described herein and find them to be free from visible signs of infectious, contagious, or communicable disease." Further, at the request of Holloway, all the Idaho cows were blood tested by agents of Idaho specifically for the disease brucellosis. As a result of these tests,

the animals were represented to be free of the disease brucellosis. Finally, all the animals were approved for export by another agent of Idaho.

Grange believes Idaho was negligent in the handling of the testing, certifying, and exporting of said animals. Grange alleges these negligent acts of Idaho allowed this disease to be exported from Idaho into Washington causing the damages to the seven Whatcom County dairy farmers.

2. **The Decisions Below.**

At a trial in 1984, a Whatcom County jury found Holloway negligently imported diseased dairy cows from Idaho causing the loss of seven Whatcom County dairy herds and awarded seven plaintiffs damages of just under $3,000,000. In mid-June of 1985, Holloway settled with the seven plaintiffs for $1,500,000. On June 28, 1985, these contribution claims

were filed by Grange in Whatcom County Superior Court.

Grange, as assignee of all Holloway's statutory contribution claims, sued the State of Washington, various state of Washington employees, the State of Idaho and the Idaho seller, Clyde Hughes, for contribution, in Whatcom County Superior Court. The Whatcom County Superior Court has personal jurisdiction over every other named defendant, including Clyde Hughes, the Idaho seller.

The Washington State Court of Appeals held due process required a three-step analysis for personal jurisdiction over Idaho. The Court of Appeals found the first two steps of the analysis were the same two steps required under RCW 4.28.185(1)(b).

Having found purposeful acts of agents of Idaho directed at Holloway, a

known Washington resident, and millions of dollars of damages in Whatcom County, Washington, "minimum contacts" existed and the requirements of RCW 4.28.185(1)(b) were satisfied. The Court of Appeals then determined that the exercise of jurisdiction was appropriate under the various factors used to determine "fair play and substantial justice." See Appendix "C", pages C-9 through C-12.

The Washington State Supreme Court found jurisdiction under RCW 4.28.185(1)(b). However, the Washington State Supreme Court looked at the "purpose" or intent of "minimum contacts" without weighing any other factor previously enumerated by this Court. Grange was denied due process of the law because the Washington State Supreme Court did not properly determine whether the exercise of jurisdiction comported

with "traditional notions of fair play and substantial justice." The failure to conduct a step three analysis after establishing jurisdiction under RCW 4.28.185(1)(b) is error.

REASONS FOR GRANTING THE WRIT

A writ of certiorari should be granted because the Washington State Supreme Court has:

1. Decided a federal question in this case in a way that conflicts with decisions of this Court or, in the alternative, an important question of United States constitutional law remains unsettled by this Court; and

2. Decided a federal question in this case in conflict with decisions of federal courts of appeal and/or another state court of last resort on the same matter.

I. Background of the Questions.

"Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice'." (Emphasis added.) Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985); see also International Shoe Co. v. Washington, 326 U.S. 310, 320 (1945). This test of personal jurisdiction has remained constant in this Court for over 40 years.

The test established by International Shoe and its progeny makes it clear that to obtain jurisdiction over a non-resident defendant, the defendant must first have "fair-warning" that his act or activity may subject him to jurisdiction in Washington. Burger King,

supra, at 472. The "fair-warning" requirement is satisfied if the non-resident defendant "purposefully directed" his activities at a Washington resident "and the litigation results from alleged injuries that 'arise out of or relate to' those activities." Id.

In this case the Washington State Supreme Court confused its analysis of whether Idaho "purposefully directed" its activities at Harold Holloway, a Washington resident, with an analysis of the "purpose" of Idaho's negligent acts.

The Idaho agents tested diseased animals and certified them for export from Buhl, Idaho to Toledo, Washington at the request of Harold Holloway, a resident of Toledo, Washington. The results of the tests, indicating the animals were not diseased, and the certifications were written by the agents of Idaho on health certificates which

clearly identified the animals as destined for export to a Washington resident in the state of Washington.

This litigation clearly results from alleged injuries that arose out of and relate to the negligent activity (testing and/or certification) of Idaho agents purposefully directed at Harold Holloway.

The above facts established minimum contacts under Burger King, supra. The Washington State Supreme Court appeared to go this far.[1]

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1. "There is no dispute that the current cause of action arose from Idaho's contacts here. The only question is whether Idaho committed a 'tortious act' within Washington, when all of its actions occurred outside the state. This court has held many times that when an injury occurs in Washington, it is an inseparable part of the 'tortious act' and that act is deemed to have occurred in this state for purposes of the long-arm statute. . . .

The Court of Appeals concluded that the injury in this case occurred in Washington, thereby satisfying the statutory requirement that a tortious act occur in this state. Idaho has not challenged this conclusion in its petition for review, arguing instead that the Court of Appeals erred in its constitutional analysis." (Emphasis added.) Grange Insurance v. State, 110 Wash.2d 752, 757, 757 P.2d 933 (1988).

The Washington State Supreme Court, along with the Washington State Court of Appeals, correctly determined that Washington had jurisdiction under RCW 4.28.185(1)(b).[2] Further, the Washington State Supreme Court admitted the Court of Appeals followed a long line of prior Washington State Supreme Court cases.[3]

The long line of Washington State Supreme Court cases, Nixon v. Cohn, 62 Wash.2d 987, 385 P.2d 305 (1963); Oliver

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2. If jurisdiction is present under RCW 4.28.185(1)(b), as a matter of law 'minimum contacts' are present. Both the Court of Appeals and the Washington State Supreme Court decided that jurisdiction existed under RCW 4.28.185(1)(b). This position was not challenged by Idaho. Grange v. State, 110 Wash.2d at 757.

3. "Were these principles to be applied in the present case, Idaho would be deemed to have established purposeful minimum contacts in this state **on the basis that its own employees knew that these particular cows would be immediately shipped into Washington upon a determination that the cows were free of disease.**" (Emphasis added.) Id., at 762.

v. American Motors Corp., 70 Wash.2d 875, 425 P.2d 647 (1967); Smith v. York Food Mach. Co., 81 Wash.2d 719, 504 P.2d 782 (1972); and Werner v. Werner, 84 Wash.2d 360, 526 P.2d 370 (1974) all used International Shoe, supra, as their touchstone. See Nixon, at 992; Oliver, at 880; Smith, at 772; and Werner, at 365.

However, the Washington State Supreme Court held a different result was required in this case because of this Court's decisions in Burger King, supra, and Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987).[4]

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4. "The cases relied upon by the Court of Appeals were decided at a time when the United States Supreme court had not clearly established that the purposeful nature of the minimum contacts as a separable requirement. . . However, two recent opinions from the Supreme court indicate unambiguously that the requirements are indeed separate. Burger King, 471 U.S. at 476. . . Asahi Metal Indus. Co. v. Superior Court, supra." Grange v. State, 110 Wash.2d at 759, 760.

The decision of the Washington State Court of Appeals is consistent with International Shoe, Burger King, and Asahi, and the decision of the Washington State Supreme Court is in conflict with these cases.

Petitioner believes the decisions of the United States Supreme Court are clear and consistent on the issue of whether "purposeful minimum contacts" exist in this case and that an analysis of "traditional notions of fair play and substantial justice" is required. The Washington State Supreme Court did not agree.[5]

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5. "It is undisputed that Idaho knew that the cows being tested in this particular case were destined for immediate sale to a Washington buyer. This fact triggers an issue that the United States Supreme Court has been unable to resolve." (Emphasis added.) Grange v. State, 110 Wash.2d at 761.

II. The Decision of the Washington State Supreme Court is in Conflict with the Decisions of this Court.

A. Burger King and Asahi.

The Washington State Supreme Court has long applied the jurisdictional rules of International Shoe, supra, and Hanson v. Denckla, 357 U.S. 235 (1958) in a three-part test for tort defendants: (1) there must be an act "purposefully directed" at a forum resident; (2) the cause of action must "arise out of or relate to" the purposeful act; and (3) the assumption of jurisdiction by Washington must not offend "traditional notions of fair play and substantial justice." Tyee Constr. Co. v. Dulien Steel, 62 Wash.2d 106, 115-116, 381 P.2d 245 (1963).

This Court has established a similar analysis. Factors 1 and 2 above are called the "fair warning" or "minimum contacts" requirement. These same two

factors must be present for jurisdiction under RCW 4.28.185(1)(b). See Oliver v. American Motors Corp., supra, and Smith v. York Food Mach. Co., supra.

Once these two factors are present, the court must balance the purpose and nature of the contact with "other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice'." Burger King, supra, at 476 and International Shoe, supra, at 320.

The Washington State Supreme Court ignored this analysis. It determined there were negligent acts "purposefully directed" at Holloway, a known Washington resident and that injury occurred in Washington. However, it refused to go on to step 3, apparently incorrectly holding that Burger King and Asahi required the Washington Supreme Court to look at the "purpose" of the "purposeful contact"

under step one before being concerned about fair play and substantial justice.

Both Burger King and Asahi require a thorough analysis of the following factors before denial of jurisdiction is appropriate: burden on the defendant; forum state's interest in adjudicating the dispute; plaintiff's interest in obtaining convenient and effective relief; the judicial system's interest in obtaining the most efficient resolution of controversies; the state's shared interest in furthering fundamental, substantive social policies; and the purpose or intent of contacts. Burger King, supra, at 476, 477 and Asahi, supra, at 113.

To deny plaintiff any forum to litigate its million-dollar damage claim without a thorough analysis of the above factors denies plaintiff fair play and substantial justice.

Asahi provides no support for the decision of the Washington State Supreme Court. In Asahi a majority of this Court found insufficient minimum contacts by a thorough analysis of the factors inherent in fair play and substantial justice.[6]

B. Nevada v. Hall.

The Washington State Supreme Court's decision clearly conflicts with Nevada v. Hall, 440 U.S. 410 (1979). In Nevada this Court held the forum state is free of all constitutional restrictions, except due process, to adjudicate grievances against foreign states. Id., at 426.

The Washington State Supreme Court apparently advanced a new rule for

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6. "This is one of those rare cases in which 'minimum requirements' inherent in the concept of 'fair play and substantial justice'. . . defeat the reasonableness of jurisdiction even (though) the defendant has purposefully engaged in forum activities." (Emphasis added.) Asahi, supra, at 116.

governmental agencies. Grange's claim was not brought under RCW 4.28.185(1)(a), "the transaction of any business within this state." However, the Washington State Supreme Court stated, "[T]here is nothing in the record to indicate that Idaho directly profited when its cows were sold in Washington." Grange v. State, 110 Wash.2d at 762.

In Nevada v. Hall, the purpose of the trip by the Nevada employee was not discussed. Should jurisdiction have been denied if there was no commercial or "profit-seeking" purpose of the trip?

The purpose of the negligent act is but one factor of six to be weighed in step three. The purpose of the act is not a sole factor to be weighed before arriving at step three. There is a substantial difference between analyzing whether an act is purposefully directed at a forum resident and analyzing the

purpose of the act.

In Biscoe v. Arlington County, 738 F.2d 1352 (D.C. Cir. 1984) the court did not analyze the purpose of the Arlington County, Virginia police officer's trip when he negligently caused an accident. Further, the Biscoe court did not attempt to analyze the purpose of Arlington County's training or supervision. Arlington County's training and supervision likely were not intended for profit or of a commercial nature.

III. The Decision of the Washington State Supreme Court Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

A. "Minimum Contacts."

The decision of the Washington State Supreme Court suggests that this Court has been unable to define when a defendant "purposefully established 'minimum contacts' in the forum state." Are minimum contacts with Washington

established when a defendant negligently tests and certifies animals in Idaho, clearly destined for Washington, for sale to a Washington resident? These facts trigger "an issue that the United States Supreme Court has been unable to resolve." Grange v. State, 110 Wash.2d 752, 761.

The Washington State Supreme Court seems to imply this question is not settled. Petitioner Grange disagrees. However, if Asahi supports the decision of the Washington State Supreme Court, then this important question is not settled and should be.

B. Burden of Proof.

The Washington State Supreme Court placed great importance on the fact "[T]here is nothing in the record to indicate that Idaho directly profited when its cows were sold in Washington." Id., at 762. However, there is nothing

in the record to suggest that Idaho did not profit. This finding of the Washington State Supreme Court is made with no record. Should this factor be important, the burden of proof on the purpose of the test is on Idaho. See Burger King, supra, at 477.

Apparently, the Washington State Supreme Court felt this important federal question is also unresolved because the Washington Supreme Court finds the language from Burger King only "suggests" that the burden of proof "might" be with the defendant. "Nevertheless, because this case does not turn on an analysis of the third element, we need not discuss that element's burden of proof." Grange v. State, 110 Wash.2d at 756.

Grange disagrees that the issue is not settled. ". . .[W]here a defendant who purposefully has directed his activities at forum residents seeks to

defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." Burger King, supra, at 477.

IV. The Washington State Supreme Court Has Decided Personal Jurisdiction in a Way in Conflict with the Supreme Court of Montana and Federal Courts of Appeal.

As support for its position that the balancing test (prong three) is not necessary in this case, the Washington State Supreme Court cited Simmons v. State, 206 Mont. 264, 670 P.2d 1372 (1983) and Wright v. Yackley, 459 F.2d 287 (9th Cir. 1972).

While the Simmons court found a lack of minimum contacts, the test applied by the Simmons court was "fair play and substantial justice" or prong three. Simmons, supra, at 1377, citing International Shoe at 316.

The Simmons court evaluated all the factors prescribed under prong three. See Simmons, supra, at 1380-1383.

Plaintiff's access to a forum was a focus by the Simmons court.[7]

The Washington State Supreme Court's reliance on Wright, supra, is also

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7. "Montana courts certainly have an interest in allowing Montana plaintiffs to seek restitution for tortious conduct. . . . (however), this interest of plaintiff's might not be as significant if the plaintiff has the power to select a different forum. It is clear from the record that plaintiff had that choice and exercised it in favor of the Oregon forum in 1979. And, the option to refile in the near future is still open." Id., at 1383.

"Justice undeniably would be defeated if the refusal to assert jurisdiction would insulate Oregon from any malpractice claims. . . . We emphasize that the services being attacked here were performed in Oregon, and that Oregon courts are open to vindicate the interests in quality medical care." Id., at 1384.

"The Oregon forum is still open to vindicate any claim of negligence on the part of that state's medical laboratory. And as we emphasized earlier in this opinion, the focus of the alleged negligent acts warrants consideration of the Oregon forum as the most convenient and efficient for resolution of this claim." Id., at 1386.

misplaced. In this case, the Washington Supreme Court found that jurisdiction under the Washington Tort Long Arm Statute was undisputed. RCW 4.28.185(1)(b).

In Wright the 9th Circuit conducted no inquiry into "traditional notions of fair play and substantial justice" because it held "that no tort was committed within the State of Idaho which would constitutionally confer jurisdiction under the State's long-arm statute." Wright v. Yackley, supra, at 291.

The Washington State Supreme Court decision in this matter is also in conflict with Biscoe v. Arlington County, 738 F.2d 1352 (D.C. Cir. 1984) as discussed above.

V. Question(s) Presented are Substantial.

Grange has no access to any other

forum. "The record does not show that Grange Insurance has a remaining access to any other forum." Grange Insurance v. State, 49 Wash.App. 551, 562, 744 P.2d 366 (Div. I, 1987). This was ignored by the Washington State Supreme Court.[8]

The "purpose" of the "purposeful conduct" must be balanced with other considerations as was done by the Washington State Court of Appeals.[9] When this balancing is done, Idaho is unable to present a compelling case against jurisdiction.

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8. "Nevertheless the availability of an alternative forum, although important to analysis of the 'fair play and substantial justice' under the third due process element, is irrelevant to analysis of the first element. . . .

Because we have held that the first due process element precludes the extension of jurisdiction over Idaho in this case, we need not analyze if the third due process element was satisfied." Grange v. State, 110 Wash.2d at 765.

9. The Washington State Court of Appeals analyzed the following factors: 1) burden on defendant, 2) conflict with Idaho's sovereignty, 3) Washington's interest, 4) effective relief for plaintiff, 5) most efficient judicial resolution of dispute, and 6) alternative relief.

Petitioner emphasizes that if certiorari is not granted, a state court may deny the only forum available to an injured plaintiff without any analysis as to whether denial of a forum is in accord with "traditional notions of fair play and substantial justice" even if "minimum contacts" exist. If review is not accepted, the present decision will cause many more instances of confusion, doubt and differing results in an area where it is highly important for litigants to be accorded similar results.

CONCLUSION

For the foregoing reasons, petitioner Grange respectfully submits that this Court should grant a writ of certiorari to review the decision of the Washington State Supreme Court.

Respectfully submitted,

Douglas R. Shepherd
Attorneys for Petitioner

APPENDIX "A"

GRANGE INSURANCE ASSOCIATION,

Respondent,

v.

THE STATE OF WASHINGTON, ET AL,

Defendants.

THE STATE OF IDAHO,

Petitioner,

NO. 54634-7

ORDER DENYING MOTION FOR RECONSIDERATION

The Court having decided unanimously that the respondent's motion for reconsideration should be denied,

It is ordered that the motion be and it hereby is denied.

Dated this 7th day of September, 1988.

/s/ Vernon R. Pearson
Chief Justice

APPENDIX "B"

[No. 54634-7. En Banc. June 16, 1988.]
110 Wash.2d 752
757 P.2d 933

GRANGE INSURANCE ASSOCIATION, Respondent,

v. THE STATE OF WASHINGTON, ET AL,

Defendants,

THE STATE OF IDAHO, Petitioner.

[1] **Courts -- Jurisdiction -- Nonresidents -- Due Process -- Purposeful Minimum Contacts -- Necessity.** Due process prohibits the assertion of jurisdiction over a nonresident unless the nonresident's contacts with the forum jurisdiction were purposeful.

[2] **Courts -- Jurisdiction -- Nonresidents -- Due Process -- Purposeful Minimum Contacts -- Governmental Service Benefiting Forum State.** For purposes of the due process prohibition against extending jurisdiction over a nonresident who has not purposefully established minimum contacts in the

forum state, a foreign governmental body does not purposefully establish minimum contacts in the forum state by performing product services for the benefit of forum state residents who it knows intend to purchase the product.

[3] **Courts -- Jurisdiction -- Challenge -- Waiver -- Seeking Affirmative Relief -- Attorney Fees.** For purposes of the rule that a party waives his defense of lack of jurisdiction by seeking affirmative relief, a defendant who requests attorney fees in conjunction with a motion to dismiss for lack of jurisdiction is not seeking affirmative relief.

DORE, J., did not participate in the disposition of this case.

Nature of Action: After settling claims against its insured, an insurance company sought contribution from several

parties including a foreign state which it claimed was negligent in certifying that cattle sold by residents of the state to the insured were free from disease and infection.

Superior Court: The Superior court for Whatcom County, No. 85-2-00622-1, David A. Nichols, J., on December 6, 1985, dismissed the foreign state for lack of personal jurisdiction.

Court of Appeals: The court at 49 Wn. App. 551 reversed the judgment, holding that the assumption of personal jurisdiction over the foreign state satisfied the requirements of the long-arm statute and due process.

Supreme Court: Holding that the foreign state had not purposefully established minimum contacts in this state and had not waived its right to challenge the court's jurisdiction, the court reverses the decision of the Court

of Appeals and reinstates the judgment.

Gerald M. Ormiston (John P. Howard and Quane, Smith, Howard & Hull, of counsel), for petitioner.

Douglas R. Shepherd and Shepherd & Abbott, for respondent Grange Insurance Ass'n.

DURHAM, J.--Due process precludes Washington courts from extending long-arm jurisdiction over an out-of-state defendant unless that defendant has purposefully established minimum contacts here. At issue in the present case is if the State of Idaho purposefully established minimum contacts when it certified that particular cows were free of disease or infection, knowing that the cows would be immediately shipped to farmers in this state. Idaho inspected the cows in cooperation with a federal program designed to eradicate the outbreak of brucellosis, and consequently

was acting at least in part for the benefit of citizens of this state. Because Idaho did not purposefully avail itself of Washington's markets in the usual commercial sense, we conclude that it did not purposefully establish minimum contacts here and long-arm jurisdiction cannot be maintained.

FACTS

In 1976 and 1977, Harold and Rose Marie Holloway purchased dairy cattle from an Idaho dealer. They later learned that some of the cattle were infected with brucellosis. Brucellosis is an infectious disease which primarily affects calving in dairy cattle. It is particularly difficult to eradicate or control because the infecting organism has an incubation period that ranges from 2 weeks to more than a year, during which time the animal displays no visible signs of infection.

The Holloways are Lewis County dairy farmers who also operate a cattle dealership and auction business. In 1977, they sold cattle to Whatcom County buyers, whose dairy herds, and those of some of their neighbors, subsequently became infected with brucellosis. These farmers sued the Holloways, alleging that the brucellosis came from the Holloway farm.[1] They recovered a total judgment of $2.9 million. The Grange Insurance Association settled the claims of the Whatcom County plaintiffs by paying $1.5 million, in return for which the Holloways assigned to Grange their claims relating to this dispute.

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[1]Named as codefendants with the Holloways were the State of Washington and a variety of its officers and employees. Summary judgment was granted to these defendants pursuant to the public duty doctrine. That judgment is currently being reviewed in this court. Honcoop v. State, 43 Wn.App. 300, 716 P.2d 963 (1986), review granted, 108 Wn.2d 1030 (1987).

Grange sought contribution for its damages by suing the States of Washington and Idaho, several of their employees, and the Idaho individual who sold the cattle to the Holloways.[2] Grange argued that both states were negligent in failing to prevent the Idaho brucellosis outbreak from spreading to Washington dairy herds.

Idaho moved for dismissal based on a lack of personal jurisdiction. Idaho's contacts with this State are as follows. A veterinarian employed by the State of Idaho conducted a brucellosis test on the

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[2]Grange also brought a separate contribution action against two of the farmers who had recovered judgment against the Holloways. Grange argued that these two farmers had been negligent in allowing the brucellosis to spread to the farms of three other farmers involved in that case. The trial court granted summary judgment against Grange, but the Court of Appeals reversed, and a motion for reconsideration is currently pending in that court. Grange Insurance Association v. Megard, cause 17765-6-I.

cattle being sold to the Holloways. An affidavit from an Idaho state official indicates that "Idaho requires all cattle being sold for dairy production purposes be tested on change of ownership." Idaho's inspection was part of a cooperative effort with the federal government in controlling and eradicating brucellosis. See Idaho Code § 25-601 (1987). The veterinarian found no sign of brucellosis and signed certificates stating: "I have inspected the animals described hereon and find them to be free from visible signs of infectious, contagious, or communicable disease." Each certificate also indicated that the destination address for the cattle was that of a Washington buyer. All of Idaho's acts took place within its own state borders.

The trial court concluded that these contacts provided an insufficient basis

for Washington courts to impose jurisdiction over the State of Idaho and dismissed Idaho from the case. The Court of Appeals reversed, holding that Idaho was subject to the jurisdiction of Washington courts under this state's long-arm statute, RCW 4.28.185, and the due process clause of the federal constitution. Grange Ins. Ass'n v. State, 49 Wn.App. 551, 744 P.2d 366 (1987).

Idaho filed a petition for review in this court, challenging the constitutional analysis engaged in by the Court of Appeals. The State of Washington joined in seeking review on these grounds and also argued that jurisdiction should be declined as a matter of comity. We granted review.

ANALYSIS

Analysis of jurisdiction under a long-arm statute involves two separate

issues: (1) does the statutory language purport to extend jurisdiction, and (2) would imposing jurisdiction violate constitutional principles. See Werner v. Werner, 84 Wn.2d 360, 364, 526 P.2d 370 (1974) (long-arm jurisdiction is intended to operate "to the full extent allowed by due process except where limited by the terms of the statute"). Courts should address the statutory issue before reaching the constitutional issue. Lake v. Lake, 817 F.2d 1416, 1420 (9th Cir. 1987); Wolf v. Richmond Cy. Hosp. Auth., 745 F.2d 904, 909 (9th Cir. 1984), cert. denied, 474 U.S. 826 (1985). In this analysis, the burden of proof rests with the party asserting jurisdiction. In re Marriage of Hall, 25 Wn.App. 530, 536, 607 P.2d 898 (1980); Access Rd. Builders v. Christenson Elec. Contracting Eng'g

Co., 19 Wn.App. 477, 576 P.2d 71 (1978).[3]

A. Interpretation of the Long-Arm Statute

Washington's long-arm statute reads in relevant part as follows:

> (1) Any person, whether or not a citizen or resident of this state, who . . . does any of the acts in this section enumerated, thereby submits said person . . . to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:
>
> . . .

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[3]A recent Supreme Court case, however, implies that for one element of the constitutional analysis, some burden of proof might be on the defendant. In Burger King Corp. v. Rudzewicz, 471 U.S. 462, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985), the Court's rationale suggests that the burden of proof might lie with the defendant regarding the third due process element, that is, whether imposing jurisdiction would be consistent with "fair play and substantial justice". See 4 C. Wright and A. Miller, Federal Practice and Procedure § 1067, at 301-02 (2d ed. 1987). Nevertheless, because this case does not turn on analysis of the third element, we need not discuss that element's burden of proof.

(b) The commission of a tortious act within this state;

. . .

(3) Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this section.

. . .

RCW 4.28.185.

There is no dispute that the current cause of action arose from Idaho's contacts here. The only question is if Idaho committed a "tortious act" within Washington, when all of its actions occurred outside this state.[4] This court

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[4]Whether Idaho's acts were actually tortious is not currently before this court. That issue relates to the merits of the case, not to a motion to dismiss for lack of jurisdiction. Grange Ins. Ass'n v. State, 49 Wn.App. 551, 556, 744 P.2d 366 (1987).

has held many times that when an injury occurs in Washington, it is an inseparable part of the "tortious act" and that act is deemed to have occurred in this state for purposes of the long-arm statute. See, e.g., Smith v. York Food Mach. Co., 81 Wn.2d 719, 722, 504 P.2d 782 (1972); Bowen v. Bateman, 76 Wn.2d 567, 575, 458 P.2d 269 (1969).

The Court of Appeals concluded that the injury in this case occurred in Washington, thereby satisfying the statutory requirement that a tortious act occur in this state. Idaho has not challenged this conclusion in its petition for review, arguing instead that the Court of Appeals erred in its constitutional analysis. Accordingly, this issue is outside the scope of our review. RAP 13.7(b).

B. Due Process Considerations

Idaho contends that extension of

jurisdiction in this case would violate its due process rights under the Fifth Amendment to the federal constitution.

The United States Supreme Court has established that due process requires that the following three elements be met before jurisdiction can be constitutionally extended: (1) that purposeful "minimum contacts" exist between the defendant and the forum state; (2) that the plaintiff's injuries "arise out of or relate to" those minimum contacts; and (3) that the exercise of jurisdiction be reasonable, that is, that jurisdiction be consistent with notions of "fair play and substantial justice." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472-78,85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985). This same analysis was followed in the plurality and concurring opinions that constitute Asahi Metal Indus. Co. v. Superior Court, __ U.S.__,

94 L. Ed. 2d 92, 107 S. Ct. 1026 (1987).

The same general standards have been adopted in Washington case law, although they are phrased in a slightly different manner. This court has set out the following test:

> [T]here are three basic factors which must coincide if jurisdiction is to be entertained. Such would appear to be: (1) The nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state; (2) the cause of action must arise from, or be connected with, such act or transaction; and (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation.

(Footnotes omitted.) Tyee Constr. Co. v. Dulien Steel Prods., Inc., 62 Wn.2d 106,

115-16, 381 P.2d 245 (1963). Because these two tests are so similarly phrased, this opinion refers to them jointly as the due process test.

Despite the language of these tests, the Court of Appeals concluded that the first element could be satisfied without any analysis of the purposefulness of Idaho's actions. The court stated that this first due process element was based only on the long-arm statute, requiring no more than the commission of a tortious act within this state. Grange, at 555-56. Accordingly, the court relegated its analysis of "purposefulness" to the third prong of due process. Grange, at 557-59. This difference is important. If "purposefulness" is analyzed under the first requirement, then a lack of "purposefulness" would preclude jurisdiction. If, however, it is analyzed under the third requirement,

"purposefulness" would be merely one of a number of factors to be balanced in determining if jurisdiction is reasonable and fair and, therefore, an absence of that factor would not necessarily be fatal to jurisdiction.

The Court of Appeals was not without support in its conclusion that evaluation of the first due process element need not include analysis of "purposefulness". See Smith v. York Food Mach. Co., 81 Wn.2d 719, 722, 504 P.2d 782 (1972); Bowen v. Bateman, supra at 575; Golden Gate Hop Ranch, Inc. v. Velsicol Chem. Corp., 66 Wn.2d 469, 471, 403 P.2d 351 (1965); cert. denied, 382 U.S. 1025 (1966); see also Nixon v. Cohn, 62 Wn.2d 987, 385 P.2d 305 (1963). However, other cases from this court suggest that this statutory analysis is only the starting point for proper determination of the first element, in that purposefulness

must still be addressed. See Oliver v. American Motors Corp., 70 Wn.2d 875, 884-89, 425 P.2d 647 (1967); In re Miller, 86 Wn.2d 712, 719, 548 P.2d 542 (1976).

[1] The cases relied upon by the Court of Appeals were decided at a time when the United States Supreme Court had not clearly established that the purposeful nature of minimum contacts is a separate requirement from the balancing test of the third element. See 4 C. Wright and A. Miller, Federal Practice and Procedure § 1067 at 299-300 (2d ed. 1987). However, two recent opinions from the Supreme Court indicate unambiguously that the requirements are indeed separate. Burger King, 471 U.S. at 476 ("Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other

factors to determine whether the assertion of personal jurisdiction [would be justified under the third element]"); Asahi Metal Indus. Co. v. Superior Court, supra. Accordingly, there is no longer any doubt that a party asserting long-arm jurisdiction must show "purposefulness" as part of the first due process element. Absent this showing, jurisdiction cannot be imposed. See Stuart v. Spademan, 772 F.2d 1185, 1191-92 (5th Cir. 1985) ("the fairness factors [of the third due process element] cannot of themselves invest the court with jurisdiction over a nonresident when the minimum-contacts analysis weighs against the exercise of jurisdiction").

In applying this standard, we must determine if Idaho purposefully directed its activities toward this state. Grange argues that Idaho knew that its acts

would directly affect Washington residents and, therefore, it acted purposefully here. Idaho argues that its acts were not directed purposefully at Washington residents because its acts were merely part of a general policy of testing all cattle being transferred within the state, whether they are destined to leave the state or not.

In Burger King, the United States Supreme Court explored in detail the first due process element. Minimum contacts are established if the defendant has "'purposefully directed' his activities at residents of the forum" state. Burger King, at 472 (quoting Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774, 79 L. Ed. 2d 790, 104 S. Ct. 1473 (1984)). Where defendants "'purposefully derive benefit'" from their interstate activities, it would be unfair to allow them to escape the

consequences that proximately arise from these activities in other jurisdictions. Burger King, at 473-74 (quoting Kulko v. Superior Court, 436 U.S. 84, 96, 56 L. Ed 2d 132, 98 S. Ct. 1690 (1978)). In slightly different terms, the Court also stated that jurisdiction should only be imposed if a defendant "purposefully avails itself" of the privilege of acting within the forum state, thereby involving the benefits and protections of its laws. Burger King, at 475 (quoting Hanson v. Denckla, 357 U.S. 235, 253, 2 L. Ed. 2d 1283, 78 S. Ct. 1228 (1958)).

It is undisputed that Idaho knew that the cows being tested in this particular case were destined for immediate sale to a Washington buyer. This fact triggers an issue that the United States Supreme Court has been unable to resolve. In Asahi Metal Indus. Co. v. Superior Court, supra, the Court

was called on to decide if the first due process element -- "purposefulness" -- is satisfied by showing that the defendant was aware that the stream of commerce would "sweep" its product into the forum state. Four Justices concluded that this showing by itself does not satisfy the first due process element. These Justices would require an additional showing that other acts were directed to the forum state, such as advertising there. Asahi, 107 S. Ct. at 1033 (opinion of O'Connor, J., with Rehnquist, C.J., Powell and Scalia, JJ., concurring). Four other Justices held that mere awareness was enough to establish a "purposeful act" directed to the forum state's residents. Asahi, 107 S. Ct. as 1035 (opinion of Brennan, J., with White, Marshall, and Blackmun, JJ., concurring). The ninth member of the Court, Justice Stevens, concluded that

this issue did not need to be reached. Asahi, 107 S. Ct. at 1038 (White and Blackmun, JJ., concurring).

There seems to be no similar split of authority within this state's courts, at least as far as nonresident manufacturers and retailers are concerned. This court has decided that purposeful minimum contacts are established when an out-of-state manufacturer places its products in the stream of interstate commerce, because under those circumstances it is fair to charge the manufacturer with knowledge that its conduct might have consequences in another state. Smith v. York Food Mach. Co., 81 Wn.2d 719, 723, 504 P.2d 782 (1972) (and cases cited therein). Additionally, out-of-state retailers can be subject to jurisdiction here if they can be charged with knowledge that their transactions might have consequences

here, although a retailer's mere placing of a product into interstate commerce is not by itself a sufficient basis to infer the existence of purposeful minimum contacts. Oliver v. American Motors Corp., 70 Wn.2d at 889; Smith v. York Food Mach. Co., supra at 724.

Were these principles to be applied in the present case, Idaho would be deemed to have established purposeful minimum contacts in this state on the basis that its own employees knew that these particular cows would be immediately shipped into Washington upon a determination that the cows were free of disease.

[2] However, examination of the policies behind the first due process element reveals that these principles should not be used to extend jurisdiction over Idaho in the present case. While the rule makes sense with respect to manufacturers

and retailers, it does not make sense when applied to a state governmental agency performing a service that benefited the forum state. As was outlined above in the discussion of Burger King, extending jurisdiction is justified only if the defendant has purposefully availed itself of the forum state's markets, thereby deriving benefits and protections of the forum state's laws, so that it would be unfair to allow the defendant to escape the consequences for its actions in that state.

In the usual case, a commercial, nongovernmental defendant has used the forum state's market for its own profit-seeking purposes. In the present case, however, the State of Idaho has derived no such benefits. There is nothing in the record to indicate that Idaho directly profited when its cows

were sold in Washington. Arguably, it received indirect benefits, in that Idaho residents directly profited from the sale of cows to Washington residents. But these indirect benefits are not sufficient to support a finding that minimum contacts have been established, especially when Idaho's acts were in cooperation with a federal program designed to protect all purchasers of cattle from brucellosis. Idaho simply has not "availed itself" of Washington's markets in a manner that justifies imposition of long-arm jurisdiction.

The Montana Supreme Court has held under similar facts that minimum contacts were not established. Simmons v. State, 206 Mont. 264, 670 P.2d 1372 (1983). There, the State of Montana had a statutory duty to conduct certain blood tests on children born in the state or to contract with an approved laboratory to

do so. The State of Montana contracted with the State of oregon to perform these tests. A Montana resident sued the State of Oregon when that state's lab failed to detect a certain metabolic disorder in his son. The Montana court concluded that Oregon had not purposely availed itself of the privilege of conducting activities in Montana. Simmons, at 280-84. In support, the court cited to a line of cases, beginning with Wright v. Yackley, 459 F.2d 287 (9th Cir. 1972), that distinguish between "voluntary interstate economic activity, directed at the forum state's economic markets, [and] the provision of medical services outside of the forum state where the provider has not solicited clientele", such that in the latter situation jurisdiction cannot be maintained. Simmons, at 282. This distinction is based on the theory that the rendition of services is more

personal in nature than is the sale of goods, such that the location where the services are performed is of greater jurisdictional importance than is the location where a product is bought. See Simmons, at 281; Wright v. Yackley, supra at 289. It is also founded on a public policy of ensuring that medical services are fully available to all people, a policy that might be inhibited if doctors were worried about having to defend malpractice suits in distant states. Simmons, at 281-82; Wright v. Yackley, supra at 290. Accordingly, the Montana court concluded that Oregon's activity was

> for the ultimate benefit of the child, while Oregon was compensated only for its marginal costs of operation. Oregon is certainly aware that the negative as well as positive consequences of its service will be felt in Montana, but . . . it reasonably expects liability for the negative consequences only in its own state. In short, we think the facts of

> this case are more akin to the services discussed in Wright v. Yackley, supra, wherein the Ninth Circuit concluded that, because of the locus of performance and nature of the contract, the physician had not "purposely avail[ed] itself of the privilege of conducting activities within the forum State."

Simmons, at 283.

The Court of Appeals in this state has also approved of the Wright v. Yackley distinction. In Hogan v. Johnson, 39 Wn.App. 96, 692 P.2d 198 (1984), a patient treated by a doctor in California moved to Washington before she discovered that she had been injured by the doctor's treatment. The court, relying on the distinction for unsolicited medical services, held that the doctor had not purposely availed himself of the privilege of conducting activities in this state. Hogan, at 102-03.

We agree with the reasoning of these

cases in adopting the distinction for unsolicited medical services. Moreover, we concur in the manner in which the Simmons court applied that distinction to a governmental defendant. Here, comparable to the analysis of Simmons, the ultimate beneficiary of Idaho's acts was not Idaho itself, but the Washington buyers. All of Idaho's acts were conducted within its own state borders and it did not solicit business from the Washington buyers. Accordingly, we conclude that the services rendered by Idaho do not support a conclusion that is purposely availed itself of the benefits of the Washington markets. Therefore, the first prong of the due process test has not been met.

Grange places great emphasis on its argument that it has no alternative forum, other than the Washington courts, in which it is able to pursue its remedy

against Idaho. Grange argues that it cannot sue Idaho in the federal courts because of the Eleventh Amendment to the federal constitution[5], and that it probably cannot sue in the Idaho courts because of Grange's failure to timely present a claim to the Idaho Secretary of State. See Idaho Code §§ 6-905, 6-908 (1987). Nevertheless, the availability of an alternative forum, although important to analysis of the "fair play and substantial justice" under the third due process element, is irrelevant to analysis of the first element. If the first element's requirement of purposeful minimum contacts is not met, then

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[5]The Eleventh Amendment states: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." U.S. Const. amend. 11.

jurisdiction cannot be maintained here, regardless of the plaintiff's interest in obtaining relief.

Because we have held that the first due process element precludes the extension of jurisdiction over Idaho in this case, we need not analyze if the third due process element was satisfied. See Stuart v. Spademan, 772 F.2d 1185, 1194 n.7 (5th Cir. 1985); Richardson v. American Family Ins. Co., 643 F. Supp. 364, 367 (D. Mont. 1986). Likewise, we need not address the arguments raised by the State of Washington in this court to the effect that we should decline jurisdiction as a matter of comity.

C. Waiver

Finally, Grange argues that even if jurisdiction might not be proper, Idaho waived its right to object to jurisdiction when it asked the trial court to award attorney fees as part of

its motion to dismiss for lack of jurisdiction. The Court of Appeals below did not need to reach this issue because it determined that jurisdiction was properly exercised.

The Court of Appeals has several times held that "even where the defendant has objected to personal jurisdiction under CR 12(b), he may waive the defense of lack of jurisdiction by seeking affirmative relief, thereby invoking the jurisdiction of the court." In re Marriage of Parks, 48 Wn.App. 166, 170, 737 P.2d 1316, review denied, 109 Wn.2d 1006 (1987); see also Livingston v. Livingston, 43 Wn.App. 669, 671, 719 P.2d 166, review denied, 107 Wn.2d 1005 (1986); Kuhlman Equip. Co. v. Tammermatic, Inc., 29 Wn.App. 419, 424-25, 628 P.2d 851 (1981). However, affirmative relief is defined to be "[r]elief for which defendant might

maintain an action independently of plaintiff's claim and on which he might proceed to recovery, although plaintiff abandoned his cause of action or failed to establish it." Black's Law Dictionary 56 (5th ed. 1979). A motion for attorney fees incurred in defending the plaintiff's suit, of course, is dependent on the plaintiff's claim; the defendant would have no right to attorney fees if the plaintiff had not brought his claim. Because Idaho was not seeking affirmative relief, its actions did not constitute a waiver of its arguments on the jurisdiction issue.

CONCLUSION

We reverse the Court of Appeals and reinstate the trial court's order dismissing the State of Idaho for a lack of personal jurisdiction.

PEARSON, C.J., UTTER, BRACHTENBACH, DOLLIVER, ANDERSEN, CALLOW and GOODLOE, JJ., and CLARKE, J. Pro Tem., concur.

APPENDIX "C"

[No. 17581-5-I. Division One. October 26, 1987.]

GRANGE INSURANCE ASSOCIATION, *Appellant*, v. THE STATE OF WASHINGTON, ET AL, *Defendants*, THE STATE OF IDAHO, ET AL, *Respondents*.

[1] **Courts — Jurisdiction — Nonresidents — Due Process — Factors.** The assertion of personal jurisdiction over a nonresident defendant does not violate due process unless it offends traditional notions of fair play and substantial justice. A court determines whether due process requirements are satisfied by considering the extent of the defendant's purposeful interjection into Washington, the burden which defending the action in Washington places on the defendant, the extent of conflict with the sovereignty of the defendant's state, Washington's interest in adjudicating the dispute, the most efficient judicial resolution of the controversy, the importance of the forum to the plaintiff's interest in convenient and effective relief, and the existence of an alternative forum.

[2] **Courts — Jurisdiction — Nonresidents — Location of Tort — Harm in Forum State.** For purposes of asserting personal jurisdiction over a nonresident under the long-arm statute (RCW 4.28.185), a tortious act occurs within this state if a tort committed outside this state causes an injury here.

Nature of Action: After settling claims against its
49 Wash.App. 551, 744 P.2d 366

insured, an insurer sought contribution from a foreign state for negligence in certifying that cattle sold to the insured were disease free.

Superior Court: The Superior Court for Whatcom County, No. 85-2-00622-1, David A. Nichols, J., on December 6, 1985, dismissed the foreign state for lack of personal jurisdiction.

Court of Appeals: Holding that the assumption of personal jurisdiction over the foreign state satisfied the requirements of the long-arm statute and due process, the court *reverses* the judgment.

Douglas R. Shepherd and *Shepherd & Abbott*, for appellant.

Gerald M. Ormiston (*John P. Howard*, of counsel), for respondents.

WETHERALL, J.*—Grange Insurance Association, assignee of Harold and Rose Marie Holloway, appeals from an order granting the State of Idaho's motion to dismiss for lack of personal jurisdiction.

FACTS

In 1977, Harold and Rose Marie Holloway purchased dairy cows in the state of Idaho. At that time, Idaho law required all cattle sold in Idaho to be tested for brucellosis, a highly contagious disease. Pursuant to that law, the dairy cows purchased by the Holloways were tested by a veterinarian employed by the State of Idaho's Department of Agriculture and Bureau of Animal Health. The health certificates for the Holloways' animals certified that the cows were free from "infectious, contagious, or communicable disease." The certificates also stated that (1) the cows were intended for "interstate" sale; (2) that the Holloways

*This appeal was heard by a Supreme Court Justice, a retired Supreme Court Justice, and a Superior Court Judge sitting as Court of Appeals Judges Pro Tempore in Division One.

resided in Washington State; and (3) that the testing was approved by the "import–export clerk" for the "Bureau of Animal Health, State of Idaho."

The Holloways immediately proceeded to transport these cows to their dairy farm in Washington state. A short time later, the dairy farms surrounding the Holloways' farm experienced an outbreak of brucellosis. The affected farmers subsequently brought suit against the Holloways, alleging that the Holloways sold them dairy cattle infected with brucellosis. These suits resulted in the entry of two judgments against the Holloways in the amount of $2,933,235.12.

Appellant Grant Insurance Association settled the claims against the Holloways and brought this contribution action as the assignee of all claims of Harold and Rose Marie Holloway. Grange Insurance contends that Idaho negligently implemented and maintained its program of brucellosis evaluation and control and that this alleged negligence on the part of Idaho was the cause of the injuries suffered by the Holloways in the original action.

Pursuant to CR 12(b)(2), Idaho sought and the trial court granted an order dismissing it from this action on the ground that a Washington court could not entertain personal jurisdiction over Idaho. We reverse.

Decision

Issue I: By certifying livestock for export to Washington state, did the State of Idaho become amenable to the personal jurisdiction of a Washington court within the intent of Washington's long–arm statute, RCW 4.28.185, and the due process clause of the federal constitution?

The enormous expansion of personal jurisdiction in this country has been mirrored in Washington, and in several instances Washington has led the way in furthering such expansion. *See* Trautman, Long–Arm and Quasi in Rem Jurisdiction in Washington, 51 Wash. L. Rev. 1 (1975). Long–arm jurisdiction in this state was intended to be operative to the full extent allowed by due process except

where limited by the terms of RCW 4.28.185.[1] *See Deutsch v. West Coast Mach. Co.*, 80 Wn.2d 707, 497 P.2d 1311, *cert. denied*, 409 U.S. 1009 (1972); *Oliver v. American Motors Corp.*, 70 Wn.2d 875, 425 P.2d 647 (1967); *Tyee Constr. Co. v. Dulien Steel Prods., Inc.*, 62 Wn.2d 106, 381 P.2d 245 (1963). This court finds no reason to retreat from our current personal jurisdiction boundaries.

[1, 2] Historically, jurisdiction was grounded on the court's de facto power over the defendant's person. Therefore, his presence was prerequisite to its rendition of a judgment personally binding him. *Pennoyer v. Neff*, 95 U.S. 714, 733, 24 L. Ed. 565, 572 (1877). Today, due process requires only that in order to subject a nonresident defendant to a judgment in personam, the defendant must have certain minimum contacts such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 66 S. Ct. 154, 158, 161 A.L.R. 1057 (1945).

As conditions precedent to the exercise of personal jurisdiction over nonresident defendants pursuant to RCW 4.28.185(1)(a) and (b), the following factors have been promulgated: (1) The nonresident defendant must purposefully do some act or consummate some transaction in the forum state; (2) the cause of action must arise from, or be connected with, such act or transaction; and (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, considerations being given to the quality, nature, and

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[1]The current Washington long-arm statute, RCW 4.28.185, provides, in part:

"(1) Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits said person, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:

"(a) The transaction of any business within this state;

"(b) The commission of a tortious act within this state;

"(c) The ownership, use, or possession of any property whether real or personal situated in this state;"

extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation. *Tyee Constr. Co. v. Dulien Steel Prods., Inc., supra* at 115–16.

These factors are, in part, a distillation of the due process standards announced in *International Shoe Co. v. Washington, supra,* and refined in *Hanson v. Denckla,* 357 U.S. 235, 2 L. Ed. 2d 1283, 78 S. Ct. 1228 (1958); *Travelers Health Ass'n v. Virginia ex rel. State Corp. Comm'n,* 339 U.S. 643, 94 L. Ed. 1154, 70 S. Ct. 927 (1950); *Perkins v. Benguet Consol. Mining Co.,* 342 U.S. 437, 96 L. Ed. 485, 72 S. Ct. 413 (1952); *McGee v. International Life Ins. Co.,* 355 U.S. 220, 2 L. Ed. 2d 223, 78 S. Ct. 199 (1957).

The first two factors are based on Washington's long–arm statutes. The third factor is related to the convenience of the forum and federal constitutional due process restrictions to any state's assertion of personal jurisdiction upon nonresident defendants. *International Sales & Lease, Inc. v. Seven Bar Flying Serv.,* 12 Wn. App. 894, 533 P.2d 445 (1975); *Werner v. Werner,* 84 Wn.2d 360, 526 P.2d 370 (1974).[2]

Washington courts have consistently applied the *Tyee* factors which we hold must be present if jurisdiction is to be entertained. We find that the *Tyee* factors are satisfied here.

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[2]While these factors have served as functional guideposts anterior to the exercise of adjudicatory power, they are not necessarily the constitutional limits of the forum's jurisdiction. *See generally* Von Mehren & Trautman, *Jurisdiction To Adjudicate: A Suggested Analysis,* 79 Harv. L. Rev. 1121 (1966); Comment, Developments in the Law: State–Court Jurisdiction, 73 Harv. L. Rev. 909 (1960).

Understandably, the broadened concept of personal jurisdiction over nonresident defendants and foreign corporations, in cases falling within the scope of RCW 4.28.185(1)(a), does not readily lend itself to the promulgation of an infallible formula automatically determinative of every case. The amount and kind of activities which must be carried on in the forum state in order to make jurisdiction of that state reasonable and just are to be determined in each case. *Perkins v. Benguet Consol. Mining Co.,* 342 U.S. 437, 445, 96 L. Ed. 485, 72 S. Ct. 413 (1952); *Tyee Constr. Co. v. Dulien Steel Prods., Inc.,* 62 Wn.2d 106, 115, 381 P.2d 245 (1963).

With respect to the first two factors, Grange Insurance asserts that its cause of action rises from Idaho's purposeful act of certification. Whether a "tortious act" was actually committed is not presently before us. Grange Insurance alleged that the injury occurred in Washington and since such injury is an inseparable part of the "tortious act" as mentioned in RCW 4.28.185(b)(1), the "tortious act," for the purpose of this appeal, is deemed to have occurred within the state. *See Hogan v. Johnson*, 39 Wn. App. 96, 692 P.2d 198 (1984); *Smith v. York Food Mach. Co.*, 81 Wn.2d 719, 722, 504 P.2d 782 (1972); *Bowen v. Bateman*, 76 Wn.2d 567, 575, 458 P.2d 269 (1969); *Golden Gate Hop Ranch, Inc. v. Velsicol Chem. Corp.*, 66 Wn.2d 469, 471, 403 P.2d 351 (1965), *cert. denied*, 382 U.S. 1025 (1966).

Addressing the third *Tyee* factor, the question becomes under what circumstances should Washington courts refuse to hear the matter because of due process concerns? The Ninth Circuit has set out the factors the court should consider when addressing the due process criteria: (1) the extent of the purposeful interjection into the forum state; (2) the burden on the defendant of defending in the forum; (3) the extent of conflict with the sovereignty of defendant's state; (4) the forum state's interest in adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the forum to plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum. *Cubbage v. Merchent*, 744 F.2d 665 (9th Cir. 1984); *see also Peter Pan Seafoods, Inc. v. Mogelberg Foods, Inc.*, 14 Wn. App. 527, 544 P.2d 30 (1975); *Insurance Co. of North Am. v. Cruz*, 649 F.2d 1266 (9th Cir. 1981); *Hirsch v. Blue Cross, Blue Shield*, 800 F.2d 1474 (9th Cir. 1986).

We find it appropriate to apply this 7-factor test to the circumstances of the case at hand in determining the reasonableness of a Washington court asserting jurisdiction over the State of Idaho.

I

Extent of Purposeful Interjection

The due process clause protects a defendant's right to receive fair warning that his actions might subject him to suit in a given jurisdiction. This safeguard allows him to structure his conduct with a degree of assurance as to what will flow from his conduct. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985).

The purposeful availment prong is satisfied when a defendant takes deliberate actions within the forum state or creates continuing obligations to forum residents. *Burger King Corp. v. Rudzewicz*, 105 S. Ct. at 2184. It is not required that a defendant be physically present within, or have physical contacts with, the forum, provided that his efforts are "purposefully directed" toward forum residents. *Burger King Corp. v. Rudzewicz*, 105 S. Ct. at 2185; *Haisten v. Grass Vly. Med. Reimbursement Fund, Ltd.*, 784 F.2d 1392, 1397 (9th Cir. 1986); *Pacific Atl. Trading Co. v. M/V Main Express*, 758 F. 2d 1325, 1330 (9th Cir. 1985); *see also Travelers Health Ass'n v. Virginia ex rel. State Corp. Comm'n*, 339 U.S. 643, 648, 94 L. Ed. 1154, 70 S. Ct. 927, 929 (1950).

In this case, we have an Idaho resident selling dairy cattle from a known diseased area with an assurance through certification by Idaho that the cows were free of brucellosis. Idaho knowingly injected itself in interstate sales of cows by certifying the health of each animal. The sale of the cows was clearly documented as a sale to Washington residents for importation into Washington. Interstate sales could not be completed without the testing and approval of State of Idaho agents. The animals were tested for export and cleared. Without this clearance, a sale to Washington residents could not have occurred. The cows were later found to be carrying the disease brucellosis and caused millions of dollars in damages in Whatcom County, Washington. The acts of the State of Idaho were "purposeful", and not the sort of "fortuitous" contact which the Court, in

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 62 L. Ed. 2d 490, 100 S. Ct. 559 (1980), found insufficient for jurisdictional due process purposes.

In *World-Wide Volkswagen*, the United States Supreme Court provided guideposts as to what sorts of contacts with a forum state were so "fortuitous" as to not meet the standard of "minimum contacts" for personal jurisdiction purposes. In *World-Wide Volkswagen*, a single automobile, sold by the defendants in New York to New York residents, was involved in an accident while passing through Oklahoma. The Court's majority opinion held that since this single accident was the only contact the defendant had with Oklahoma that the Oklahoma court could not, consistent with the due process clause of the Fourteenth Amendment, exercise personal jurisdiction over the New York defendants.

Unlike the isolated, fortuitous drive-through situation in *World-Wide Volkswagen*, the State of Idaho, located on the border of the forum state, maintains an extensive, continuing pattern of trade with the forum state. The State of Idaho's certification of livestock is part of an ongoing import-export program designed to promote the trade of livestock between Idaho and Washington. The record reflects that, rather than an "isolated occurrence," the inspection by Idaho and subsequent purchase of livestock by Washington residents is continuous and of such proportions that vast numbers of permits are issued to cover such transfers. At the time of the sale, Idaho Code § 25-601 cited Washington's counterpart, RCW 16.40[3] a recognition

[3]In 1977, Idaho Code § 25-601 provided:

"The department of agriculture (hereinafter referred to as department) is hereby authorized to cooperate with the bureau of animal industry of the United States department of agriculture (hereinafter referred to as bureau), for the purpose of eradication of Bang's disease among cattle in the state of Idaho. The department shall make rules and regulations for the administration of this act and provide therein for the manner, method and system of testing cattle for Bang's disease in cooperation with the bureau for the eradication of said disease, and for such preventive measures as may be deemed necessary to carry out the cooperative work for the eradication of Bang's disease among cattle in this state.

of the ongoing nature of livestock transfers between Idaho and Washington. This reference also confirms that Idaho was aware of Washington law regarding import of livestock.

To satisfy due process this court must determine if any facts appear showing a possession of information on the part of Idaho which information would in any way charge Idaho with knowledge that this transaction might have out-of-state consequences. *Smith v. York Food Mach. Co.*, 81 Wn.2d 719, 724, 504 P.2d 782 (1972); *Oliver v. American Motors Corp.*, 70 Wn.2d 875, 889, 425 P.2d 647 (1967).

Clearly, the record reflects that all necessary information was available to agents of the State of Idaho. The certificate identifies that the livestock are for *export*. On the face of each health certificate issued on the livestock sold to the Holloways, the destination of Toledo, Washington, is clearly printed. Thus, Idaho's rendition of services directly affecting Washington residents was not an "unforeseeable, isolated occurrence." *See World-Wide Volkswagen Corp. v. Woodson*, 100 S. Ct. at 567.

Under this analysis, Idaho has therefore "purposefully availed" itself of the privilege of conducting activities in Washington. Because Idaho's actions in Washington were not an "isolated occurrence", it should reasonably foresee being haled into Washington courts.

II

Burden on Defendant

Idaho is not unfamiliar with Washington law. While Idaho, a border state, might suffer minor inconvenience in being haled before the courts of Washington, Washington is not a distant forum. Unless such inconvenience is so great as to constitute a deprivation of due process, it will not overcome clear justifications for the exercise of jurisdiction.

"Compiler's notes. . . .

". . .

"The words enclosed in parentheses so appeared in the 1939 Session Laws.

"Comp. leg. Cal. Food & Agric. Code §§ 10301-10492 (Deering).

" *Wash. Rev. Code* §§ 16.40.010-16.40.130." (Italics ours.)

Burger King Corp. v. Rudzewicz, 105 S. Ct. at 2188; *McGee v. International Life Ins. Co.*, 355 U.S. 220, 2 L. Ed. 223, 78 S. Ct. 199 (1957); *Hirsch v. Blue Cross, Blue Shield*, 800 F.2d 1474, 1477 (9th Cir. 1986).

III

Conflict With Sovereignty of Defendant's State

Courts refrain from exercising jurisdiction when another state has expressed a substantially stronger sovereignty interest and that state's courts will take jurisdiction. *Nevada v. Hall*, 440 U.S. 410, 59 L. Ed. 2d 416, 99 S. Ct. 1182 (1979); *Raffaele v. Compagnie Generale Maritime, S.A.*, 707 F. 2d 395, 398 (9th Cir. 1983). Idaho has not expressed a substantially stronger sovereignty interest in this case. *See Insurance Corp. of Ir., Ltd. v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 702 n.10, 72 L. Ed. 2d 492, 102 S. Ct. 2099 (1982); *Cubbage v. Merchent*, 744 F.2d 665, 671 (9th Cir. 1984).

IV

Forum State's Interest

Washington obviously has an interest in protecting its citizens against the tortious conduct of others, including negligence. Similarly, Washington has demonstrated an abiding interest in protecting its citizens, as well as the State's livestock business, from a foreign state's negligently certified animals for export into Washington, especially as to diseases which can cause vast amounts of death and damage.[4] Numerous Washington court decisions to provide

[4]Many Washington statutes and regulations enforce safeguards against the spread of communicable disease in livestock. The current RCW 16.36.050 provides, in part:

"It shall be unlawful for any person, or any railroad or transportation company, or other common carrier, to bring into this state for any purpose any domestic animals without first having secured an official health certificate, certified by the state veterinarian of origin that such animals meet the health requirements promulgated by the director of agriculture of the state of Washington . . ." Further, RCW 16.36.060 provides in part:

"It shall be unlawful for any person to wilfully hinder, obstruct, or resist the director of agriculture or any duly authorized representative, or any peace officer

a Washington forum have resulted from just such a "state's interest" analysis. *See Werner v. Werner*, 84 Wn.2d 360, 526 P.2d 370 (1974); *Golden Gate Hop Ranch, Inc. v. Velsicol Chem. Corp.*, 66 Wn.2d 469, 403 P.2d 351 (1965), *cert. denied*, 382 U.S. 1025 (1966); *Peter Pan Seafoods, Inc. v. Mogelberg Foods, Inc.*, 14 Wn. App. 527, 544 P.2d 30 (1975).

In *Werner v. Werner, supra*, jurisdiction was assumed even though the nonresident defendants had no personal connection within this state. The defendants were notaries public, residing in and licensed by the State of California, who allegedly negligently acknowledged a deed in California to real property located in Washington. The court allowed jurisdiction, based on Washington's interest in "the integrity of the documents" upon which the "whole of our system of title registration hinges . . ." *Werner v. Werner, supra* at 367. The health and protection of Washington's commercial livestock population would seem to be at least

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acting under him or them, when engaged in the performance of the duties or in the exercise of the powers conferred by this chapter, and it shall be unlawful for any person to wilfully fail to comply with or violate any rule, regulation or order promulgated by the director of agriculture or his duly authorized representatives under the provisions of this chapter."

Finally, the Washington Administrative Code 16–54 implements the livestock import provisions of RCW 16.36. Specifically, WAC 16–54–082 provides in part:

"All domestic bovine animals (including bison) entering Washington shall be moved on a permit issued by the office of the state veterinarian: *Provided*, That this permit requirement will be reviewed two years after the effective date to determine that the results obtained warrant the continuation of this requirement. All domestic bovine animals (including bison) shall meet the following requirements:

"(1) Tuberculosis. All beef and dairy cattle must originate from herds not under quarantine in a not less than modified accredited area.

"(2) Brucellosis health certificate requirements. All domestic bovine animals (including bison), except those consigned to quarantined registered feed lots, or to federally inspected slaughter plants for immediate slaughter, or beef breed cattle or slaughter only dairy breed cattle consigned to a state–federal approved livestock market, shall be accompanied by an official interstate health certificate and shall meet the following requirements:

"(a) Brucellosis test.

"(i) Cattle originating in class free or Class A states must be negative to an official brucellosis test conducted within thirty days prior to date of entry."

as important an interest. *Cf. Golden Gate Hop Ranch, Inc. v. Velsicol Chem. Corp., supra.*

Under the circumstances of this case, there is no indication that affording the protection of a Washington court would interfere with Idaho's interest in seeing that its livestock, as well as its citizens, are safe from communicable livestock disease.

V, VI

Most Efficient Judicial Resolution and Effective Relief for Plaintiff

The court sitting in the place the injury occurred is ordinarily the most efficient forum, that court being most competent at interpreting the applicable law. *Raffaele v. Compagnie Generale Maritime, supra* at 399. Here the majority of witnesses reside in Washington.

Considering the avoidance of a multiplicity of suits and conflicting adjudications and the "relative convenience of the parties", the court looks at the forum state's interest in adjudicating the dispute and the most efficient judicial resolution of the controversy. *Cubbage v. Merchent, supra.*

Washington courts provide Grange Insurance with a convenient forum for seeking relief. There is no evidence that the State of Idaho would be unduly burdened by litigating this dispute in Washington.

VII

Alternative Forum

The record does not show that Grange Insurance has a remaining access to any other forum.

CONCLUSION

The recent plurality decision of the United States Supreme Court in *Asahi Metal Indus. Co. v. Superior Court*, ___ U.S. ___, 94 L. Ed. 2d 92, 107 S. Ct. 1026 (1987) is consistent with the above analysis. In *Asahi*, the Court held the contracts between the defendant, a Japanese components manufacturer, and the State of California were slight and insufficient to justify the heavy and unique bur-

dens that would be placed on a Japanese corporation if forced to litigate in California. In making its decision, the Court balanced the seven *Cubbage* factors and concluded that an alternate forum and the "unique burdens" upon a Japanese corporation had significant weight in assessing the reasonableness of extending personal jurisdiction over international borders.

In the instant case, no such unique burdens exist. Such burden as may exist should be balanced with the integrity of Washington's economy and the safety of its citizens. These are factors which the *Asahi* Court implies should be weighed heavily in determining the reasonableness of extending personal jurisdiction. *Asahi Metal Indus. Co. v. Superior Court*, 94 L. Ed. 2d at 106.

Consequently, we conclude that, under the circumstances here presented, assumption of personal jurisdiction over the State of Idaho in this action would not offend "traditional notions of fair play and substantial justice" within the contemplation of the due process clause.

Because of our determination that RCW 4.28.185 affords jurisdiction over the State of Idaho, we do not consider Grange Insurance's contention that Idaho waived its jurisdiction defense by affirmatively seeking attorney's fees.

The decision of the Superior Court is reversed.

DORE and WILLIAMS, JJ. Pro Tem., concur.

APPENDIX "D"

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF WHATCOM

GRANGE INSURANCE ASSOCIATION, Assignee of Harold and Rose Marie Holloway,	)	No. 85-2-00622-1
Plaintiff,	)	ORDER GRANTING DEFENDANT STATE OF IDAHO'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION AND GRANTING JUDGMENT FOR COSTS
v.	)	
STATE OF WASHINGTON, et al.,	)	
Defendants.	)	

This matter having come on duly and regularly to be heard before the Honorable Judge David Nichols, Judge of the above-entitled Court, upon Defendant State of Idaho's Motion to Dismiss for Lack of Personal Jurisdiction and the Court having considered the records and files herein, including the following pleadings submitted on behalf of each party:

1. Motion to Dismiss for Lack of Personal Jurisdiction and

Motion

for Attorney Fees;

2. Memorandum in Support of Motion to Dismiss;
3. Affidavit of Dr. Willard G. Nelson;
4. Affidavit of John P. Howard;
5. Plaintiff's Memorandum in Opposition to Defendant State of Idaho's Motion to Dismiss for Lack of Personal Jurisdiction;
6. Defendant's Memorandum in Response to Plaintiff's Memorandum in Opposition to Motion to Dismiss;

and the Court having heard oral argument on behalf of both parties: John P. Howard on behalf of the State of Idaho and Douglas R. Sheppherd on behalf of Plaintiff Grange Insurance Association, and the Court considering

itself fully advised in the premises and having determined that this Court lacks personal jurisdiction over the Defendant, State of Idaho,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Plaintiff's complaint against Defendant State of Idaho is hereby dismissed with prejudice.

2. Defendant State of Idaho is hereby awarded judgment against Plaintiff Grange Insurance Association for its statutory attorney's fees in the sum of $125.00.

DONE IN OPEN COURT this 6th day of December, 1985.

/s/ David Nichols
JUDGE/COMMISSIONER

Presented by:

FOULDS, FELRER, PIERSON,
RYDER & McHUGH, INC., P.S.

By /s/
Gerald M. Ormiston
Attorney for Defendant

Copy Received;

SHEPHERD and ABBOTT

By /s/
Douglas R. Shepherd
Attorney for Plaintiff